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REPORT OF THE WORKING GROUP ON THE INFLUENCE OF THIRD PARTIES ON THE LAWYER-CLIENT RELATIONSHIP

INTRODUCTION

THE Group¹ was urged to take a broad view of the issue of influence of third parties on the lawyer-client relationship, and not to limit discussion to the context of Legal Services Corporation (“LSC”) funding. Most of the discussion, however, did return to the LSC restrictions. The Group spent time brainstorming the range of possible issues that could be addressed, then proceeded to focus on the following questions:

- Who are the third parties who influence the lawyer-client relationship?
- What is the nature of their influence?
- At what point does the influence become unreasonable?
- At what point does the influence become ethically problematic?
- How should a lawyer respond to unreasonable or unethical third-party influences?
- What are our recommendations?

In drafting recommendations, the Group tried not to harm clients or to raise barriers for lawyers trying to assist them under less-than-ideal circumstances. On the one hand, the group members did not want to shy away from expressing its displeasure with the negative impact of certain third-party influences. On the other, they did not want to create situations in which lawyers could be sanctioned for continuing to represent clients within the restrictions placed upon them by funders. They chose, therefore, to couch their recommendations as comments to the Model Rules, as practice guidelines for lawyers, and as issues for education and further study.²

I. INITIAL BRAINSTORMING OF ISSUES RAISED BY THE CHARGE

Following the general conference plan, during the first session the Group generated a series of questions for possible discussion:

1. Group Leader: Mary C. Daly. Author: Stephanie Edelstein. Participants: Frank P. Cervone, Stephen J. Ellmann, Barbara Glesner Fines, Lauren Hallinan, Alan Houseman, Wilhelm H. Joseph, Jr., Samuel J. Levine, April Newbauer, and David S. Udell.

2. See *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 *Fordham L. Rev.* 1751, *Recommendations* 78–84, at 1781–84 (1999) [hereinafter *Recommendations*].

- Do we want to recommend rescission of ABA opinion 96-399?³
- Do we need to take note of restrictions imposed by the Legal Services Corporation as unethical restrictions by third parties?
- Should we consider the ethical implications of the LSC restrictions even though some advocates assert that Congress has been unresponsive to arguments that are based on perceived ethical concerns? (Is how to best deal with Congress more a question of strategy rather than an issue to discuss in this context?)
- What about the influence of non-LSC funders?
- What about the influence of third parties other than funders, such as legislators, or family members?
- What are the third-party influences?
- In what sense are third parties interfering in the attorney-client relationship?
- Who is making the decisions in collaborative professional relationships? (For example, in an office of lawyers and social workers, who makes the decisions?)
- What is a reasonable limit on professional judgment?)
- To what extent do the current Model Rules⁴ address these issues? Are changes to the Model Rules needed?
- Does accepting funding to handle specific legal issues pose any ethical problem? What is a nefarious influence, what is not?
- Should our sense of what is an appropriate influence be limited to the legal-services delivery system we have today, or should we be looking at what changes may be on the horizon and what the overall system will be in the future?
- Are there, or should there be, different expectations for government and private funders? If so, what are those expectations?
- Are there any positive third-party influences?
- Would an influence be considered good/bad/not so bad depending on when it occurs?
- Is third-party funding per se an influence that cannot be avoided?
- Where ethics conflicts arise due to third-party influence, to what extent are the following solutions adequate: (1) giving notice to the client; (2) referring the client elsewhere; (3) withdrawing from representation; (4) giving advice to the client; (5) closing down the office; or (6) doing it on your own time?
- If, as the result of a third-party action, funding ends for a particular area of the program's practice, does the program or the individual lawyer have an ethical obligation to continue representation in a particular case?

3. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-399 (1996). The opinion concerns the ethical obligations of lawyers whose employers are subject to LSC funding restrictions. *Id.*

4. Model Rules of Professional Conduct (1998).

- If the program closes as the result of an action by a third party, what is the individual attorney's obligation to continue representation?
- Is the employee union a third-party influence? How would a union exert influence over the attorney-client relationship? Through contract demands? By striking? Through a contract that governs the distribution of cases and the size of individual caseloads?
- Under what circumstances are client groups a third-party influence?

We then generated a list of possible recommendations:

- Recommend that ABA Formal Opinion 96-399 be rescinded?
- Recommend changes to the Model Rules?
- Recommend changes to the Commentary to the Model Rules?
- Recommend practice guidelines?

Where ethical conflicts do arise as a result of third-party intrusions, to what extent are the following solutions adequate or appropriate?

- Giving notice to the client;
- Referring the client elsewhere;
- Withdrawing from representation (contacting the tribunal);
- Closing the office (not necessarily a joke);
- Giving notice to the funder;
- Continuing to advise the client on how to proceed; and
- Continuing representation on your own time.

III. NARROWING THE FOCUS OF THE DISCUSSION

A. *Who Are the Third Parties Who Influence the Lawyer-Client Relationship? What Is the Nature of Their Influence?*

The Group considered a range of possible third parties, including funders, regulators, boards of directors, employee unions, client groups, family members, special-interest groups, adversaries and allies, and the needs of the community. It was agreed that the nature of the influence would vary according to who the third party is, whether the lawyer is in the public or the private sector, and the relationship of the third party to the lawyer.

Funders (state, federal, local, private, charitable, or private-bar) may seek to influence the representation by attaching restrictions to funding. These restrictions might include limits on who can be served, or limits on the scope of the representation that can be provided. The restrictions could be substantive (what kinds of cases a lawyer can/cannot accept); they could be procedural (what actions a lawyer can/cannot take in the course of the representation, e.g., administrative only, no out-of-court advocacy); or they could be managerial (direc-

tives on staffing, or on who actually handles certain responsibilities within the office or program).

A funder may also seek to influence the lawyer-client relationship by limiting funding so that the lawyer is unable to provide representation that the lawyer considers adequate or professionally appropriate. Third-party funders may impose monitoring, reporting, or auditing requirements that the recipient considers inappropriate. Fiscal restraints such as a competitive bidding process that awards a contract to the bidder offering the lowest cost per case, or a pre-paid union plan that limits the cost per case, may lead to representation that the lawyer believes to be professionally inadequate or inappropriate. A third party may influence the representation by threatening sanctions for activity without which the representation is inadequate. In addition, a third-party funder might influence the lawyer-client relationship by restricting representation not funded by that particular funder (e.g., LSC restrictions on non-LSC funding).

Client groups may seek to influence representation when the interest of the group diverges from that of an individual client. Community institutions may disagree with the representation in a particular case and seek to influence that representation. Lawyers representing children or elderly clients frequently encounter family members or agency staffs who try to influence the lawyer-client relationship. The Group also considered family members (e.g., a parent attempting to influence the representation of a minor child, or an adult child attempting to influence the representation of a parent with diminished capacity); fiduciaries (e.g., a trustee or guardian); and the lawyer's social responsibility to the community at large. In some instances, the third party may be a funder and a potential party to the action. For example, in a child abuse case, the lawyer representing the child is subject to influence by parents who want the child returned to them, other family members who may also want the child, courts who do not want to impose burdensome tasks on an overworked child welfare agency, the social services agency which is investigating the abuse claim and may also have awarded the program the contract under which the child is being represented. In an adult guardianship case where a Title III program is appointed by the court to represent the incapacitated person, the area agency on aging which funds the Title III program may also be the petitioner or the potential guardian.

B. *At What Point Do Influences/Restrictions
Become Unreasonable?*

The Group agreed that not all third-party influences are inherently negative, and not all restricted practice is inherently unethical. They did reach some consensus on what third-party influences could be considered unreasonable.

One member compared this situation to a student who begins to produce course work that is of lower quality than her previous work. While going from A to B is a very significant change, it is not a disqualifying problem academically; going from B to C may still be adequate, or competent. The problem arises when the quality is lowered from C to D. At D, the quality is unacceptable, or incompetent. It was noted that the Model Rules do not allow a lawyer to obtain a client's consent to incompetent representation.⁵ The question is, what is incompetent representation in a legal-services context? Do restrictions that limit the tools a lawyer can use rise to the level of influences that create unethical practice, either by interfering with zealous representation, or by rendering representation incompetent?

Most of the discussion centered on the LSC restrictions. For example, does the LSC prohibition against seeking attorneys fees, raise an ethical issue? How does the fact that a lawyer cannot seek fees affect the attorney-client relationship? Some members of the Group argued that the prohibition on attorneys' fees affects the quality of the representation because it leaves the lawyer without the hook provided in fee-shifting statutes that make a defendant take notice of the claim. A lawyer who cannot ask for fees is unable to make the strongest claim, and is therefore not practicing competently. Others argued that a weaker claim does not necessarily mean incompetent practice. Depending on the facts, it may just narrow the scope, or take the representation down a notch, from A to B. It may not be ethically proscribed.

What makes the attorney fee situation any different from a private attorney-client agreement? If we allow private clients to accept B-level service, why can't we require poor clients to accept B-level service? Doesn't funding already control the quality and level of the services provided? What makes this any different? Is there a difference between denying a tool completely and allowing the lawyer to use professional judgment to select the tools that will be used, within certain parameters?

Several members of the Group felt strongly that what *is* unreasonable is denying the lawyer the ability to use professional judgment, especially when the client has no other place to go to obtain legal representation.

The Group attempted to set some criteria for what would constitute an unreasonable influence by a third party. Suggestions included:

- Denying tools essential to competent representation;

5. Model Rules of Professional Conduct Rule 1.7 cmt. [6] (1998) (stating that a lawyer's need for income "should not lead the lawyer to undertake matters that cannot be handled competently" despite Rule 1.7's consent provisions).

- Imposing restrictions that would hurt a current client (Model Rule 1.7 states that a lawyer should not accept representation that would materially hurt current clients);⁶
- Interfering with the lawyer's professional judgment;
- Any limitation imposed by an adversary for the purpose of making representation worse;
- Funding at a level that is insufficient to provide competent representation;
- Imposing restrictions on the use of outside funding;
- Restricting outside fundraising;
- Imposing restrictions that are unlawful or that violate an otherwise-binding ethical rule (the recent federal restrictions on lawyers counseling clients about planning for Medicaid eligibility⁷ was raised, but it was agreed that since this is a federal law that applies to all lawyers, it is not really an example of a third-party influence within our parameters); and
- Restricting a program from meeting community needs (an issue of community ethics and responsibility to the larger society).

C. At What Point Does the Influence Become Ethically Problematic?

The Group agreed that restrictions are likely to be unreasonable when they are imposed in the course of ongoing representation, although they could also be unreasonable when imposed at the outset. The group members also agreed that unreasonable restrictions are likely to be ethically problematic. They did not reach consensus on whether the LSC or other funding restrictions are so unreasonable as to affect the lawyer's ability to practice ethically, although several members felt strongly that this line had been crossed, for example, in the context of the attorneys' fees restriction.

They discussed a number of questions. Is practicing under a restriction an ethical problem if the lawyer takes the money knowing that restriction exists ahead of time? Does accepting funding that has subject-matter restrictions that limit access to justice raise an ethical problem? Every attorney has an individual obligation to assure access to justice. Does the last attorney in town have a higher ethical duty?

Where is the line between restrictions that are unpleasant, that may even be unreasonable in the eyes of a legal-services provider, and those that lead to representation that is actually unethical? Some argue that it is still possible to provide high-quality representation under the restrictions. How, then, should we categorize interference that goes to the basic core of the representation? What about restrictions that impede the ability to be a zealous advocate? Is this even the

6. *Id.* Rule 1.7.

7. See 42 U.S.C. 1320a-7b(a)(6) (Supp. II 1996).

proper inquiry to be making? The issue of attorneys' fees and similar tools was raised once more. If a lawyer cannot seek attorneys' fees, can he or she still advocate zealously? Would it be possible to argue that restrictions deny competent counsel, or effective assistance of counsel? Some members of the Group felt strongly that the prohibition against seeking attorneys' fees seriously interferes with competent representation, especially in cases where the threat of fees would be an essential tool in negotiating a fair settlement. Others had difficulty finding an ethical issue in the prohibition against seeking attorneys fees.

The Group discussed differences between funder restrictions as to the scope of services (i.e., eligibility guidelines, kinds of cases) (no consensus on acceptability), third-party restrictions such as not being able to request attorneys' fees (no consensus on acceptability), and the program's own decision to limit the kinds of services that are provided or the scope of those services. Knowing that the limited-service issue was the topic for another group, our group's participants did not address it.⁸

D. *How Should a Lawyer Respond to Unreasonable or Unethical Third-Party Influences?*

If an attorney has determined that a third-party influence is unreasonable, for whatever reason, what is the appropriate response? Is there a difference between legal-services and private sector practice in what clients should be asked to accept? What are the consequences of taking a position that legal-services practice under some restrictions would be unethical? Does that leave a lawyer only two choices—to refuse to represent under those conditions or to practice unethically? The Group wanted to avoid suggesting that nobody should practice in a legal-services program under the current restrictions. Under Model Rule 1.2, the scope of the services may be limited by agreement with the client, or by outside restrictions on types of cases.⁹ The terms of the representation may exclude certain tools (e.g., that the client is told that the lawyer will not seek attorneys' fees although the statute permits it, and is further told that the client's case is weakened as a consequence). On the other hand, under Model Rule 1.2, a potential client may not be asked to agree to representation that is so limited in scope that it falls below the level of competent representation.¹⁰

Several possible options were offered, including referring the client elsewhere, withdrawing from representation, giving notice to the funder, giving limited advice to the client, closing down the office, and continuing with the representation on the lawyer's own time. All

8. See *Report of the Working Group on Limited Legal Assistance*, 67 Fordham L. Rev. 1819 (1999).

9. See Model Rules of Professional Conduct Rule 1.2 cmt. (1998).

10. See *id.*

agreed that these options were not to be taken lightly, and that there may not be another lawyer available to represent a legal-services client.

III. DEVELOPMENT OF RECOMMENDATIONS¹¹

The group members recognized that third-party influences in the context of a legal-services practice come from funders, whether public or private, and they chose not to focus exclusively on the Legal Services Corporation.¹² They decided that the goal of the recommendations should be to guide the legal community and to educate individuals associated with legal-services programs and the universe of potential funders (e.g., IOLTA, LSC, charitable foundations, unions, LSC boards, lawyers, bar associations, punitive-damages funds, bar associations, and local agencies). Even so, much of the discussion concerned the LSC restrictions. Some members felt strongly that the organized bar should take a public position, in its ethics rules and elsewhere, that restrictions on lawyering for the poor are an attack on the profession, the poor, and the rule of law, and are unacceptable.

There was a difference of opinion within the Group on the value of seeking rescission of ABA Opinion 96-399. Those supporting seeking rescission argued that it is important to voice opposition to 96-399 because it is still on the books, and because it makes the LSC restrictions seem ethically tolerable when they are not. Others asserted that energy need not be expended on 96-399 since it was already moot and since it is unlikely that the ABA would revisit it. The Group discussed whether hearings on Ethics 2000 would be an appropriate forum for proposing rescission.

The Group wanted to send a message that funders of lawyering programs for the poor and the legal profession should not impose unreasonable restrictions, and that restrictions that necessitate withdrawal are objectionable. They chose not to recommend changes to the actual Model Rules, because they did not want to put legal-services lawyers in the untenable position of choosing between sanctions for unethical behavior and not accepting funding, or withdrawing. As a model for how to approach this troublesome issue, it was suggested that the Group consider the recently adopted commentary to Model Rule 1.14, regarding emergency representation of incapacitated clients.¹³ There, the commentary to the rules provides guidance to law-

11. Not all members of the working group were able to attend all sessions, so not all members voted on each and every recommendation. The recommendations express the sense of those members who were present at the time they were selected for presentation to the plenary assembly.

12. Because issues of influence from close family members, fiduciaries, and others similarly situated have been addressed in previous conferences, the Group chose to focus on funders.

13. See Model Rules of Professional Conduct Rule 1.14 cmts. [6]-[7] (1998).

yers without imposing sanctionable requirements. The Group also considered adding language or a comment to Model Rule 5.4, which addresses the professional independence of a lawyer,¹⁴ and maybe an ethical consideration elaborating on DR 5-107(B), which addresses influence on the lawyer by those other than the client.¹⁵ Ethicists in the Group advised that lawyers couldn't be sanctioned under either the commentary to the disciplinary rules or the ethical considerations accompanying the rules.

In considering possible practice guidelines, the Group rejected a suggestion that a lawyer should always have a duty to challenge restrictions that the lawyer considers unethical or intrusive. The guidelines are intended as suggestions to be utilized in appropriate circumstances, in accordance with the lawyer's professional judgment. For example, the group members recognized that there would be times when a lawyer feels bound to withdraw because a restriction would compromise representation or render it incompetent. They considered practice guidelines for those circumstances. The recommendations reflect the sense of the Group that challenging a third-party restriction that the lawyer considers unethical is an option. They also reflect the sense that a motion to withdraw may be required, or may be a mechanism for enabling a reviewing body to assess the constitutionality of the restrictions.

The issue of "consent" led into a discussion of whether a lawyer in a legal-services program may ask a client to consent to representation that is limited because of the restrictions. In some contexts, it may be appropriate; in others, it may not. It was noted that Model Rule 1.8(f), the current rule covering situations when one party pays a lawyer to provide services for another, requires client consent to be completely voluntary, and is written for the private market, not poverty law.¹⁶ That rule, moreover, concerns the release of confidential information, and the lawyer's loyalty to the client, not the scope of representation. While it is acceptable to obtain client consent to have

14. Model Rule 5.4 (c) provides: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." *Id.* Rule 5.4 (c).

15. DR 5-107(B) provides: "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." Model Code of Professional Responsibility DR 5-107(B) (1981).

16. Model Rule 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by rule 1.6.

Model Rules of Professional Conduct Rule 1.8(f) (1998).

someone else sit in on an interview, a low-income person's limited access to lawyers may be a coercive influence that compromises the client's ability to consent to revealing confidential information, or to restricted representation.

The Group was cautioned about the perils of recommending changes to the disciplinary rules, violations of which would be subject to sanctions. For example, if the Group were to suggest that the consent of a legal-services client to limited representation is ethically invalid, what happens when the lawyer is required by law to limit representation? The lawyer might be obligated to challenge the law, or to withdraw. Similarly, if the Group were to recommend that it is unethical for a lawyer to reveal client information at the behest of a funder, what does the lawyer do when Congress says LSC has right to obtain client names? Again, a legal challenge, or withdrawal, may be necessary. On the other hand, we do not want to ignore the issue of the legal-services lawyer who is very uncomfortable with getting consent that the lawyer believes to be coercive because there are no other choices for the client who cannot pay. Several members voiced concern that client consent is being used to make a practice seem somehow acceptable, when in reality it is not, and urged the Group to express the sense that client consent under these circumstances is troublesome, even if it can be manipulated to fit within the ethical rules. How can that sense be expressed in a recommendation, without punishing the lawyer who is simply trying to represent the client? The Group agreed that we must avoid taking a position that would make current practice by legal-services lawyers unethical. Possible language might read: Limited access to lawyers is a coercive influence that compromises the client's ability to consent to restrictions imposed by third parties, including limitations on the scope and manner of representation, conflicts of interest, and disclosure of information relating to the representation.

During the final session on Saturday afternoon, the Group reviewed the discussions of the previous sessions, and extracted points that could be collected into recommendations. It was agreed that the recommendations would include: (1) changes to the commentary to the Model Rules (with the understanding that the commentary is intended as guidance to the profession, and is not sanctionable); (2) identification of issues for further study; and (3) suggestions for education. The Group took into consideration earlier discussions and the general consensus that lawyers should not be sanctioned for providing representation while complying with restrictions imposed by funders upon that representation. The Group also took into account the original charge and the consensus of the Group that the recommendations should not be directed exclusively towards funding by the Legal Services Corporation. One participant offered to circulate a sign-up sheet at the plenary, to collect the names of those interested in working together to

educate private foundations about the ethical issues that arise from third-party influence.¹⁷

The recommendations of the Group were adopted by a clear majority at the plenary session, but a substantial minority of participants expressed their concern that the recommendations included changes to the Model Rules that, because the entire federally funded legal services program is operating under restrictions, could subject individual attorneys to sanctions. This was not the intention of the Group, and the words "comments to" have been added to the Preamble, to reflect the group's intent that the recommendations be directed to the commentary to the rules.

In a December 15, 1998 Memorandum, Alan Houseman, who was unable to be present for the final group discussion, voiced his disagreement with some of the recommendations as he interprets them.¹⁸ Mr. Houseman opposes any implication that the existing restrictions on LSC recipients are unethical under Model Rule 1.8(f).¹⁹ He notes that Model Rule 1.2 allows lawyers to restrict the scope of representation when required to do so by a funder, so long as they make the client aware of the restriction before representation has begun and so long as they do not render incompetent representation.²⁰ Mr. Houseman also disagrees with Recommendation Eighty²¹ to the extent that it suggests that withdrawal, if required by law, is objectionable, and to the extent that it suggests that a lawyer should challenge any law that requires withdrawal.²² Finally, Mr. Houseman objects to Recommendation Eighty-one²³ insofar as it suggests that a client cannot consent to representation that is subject to the LSC restrictions on the scope and manner of representation.²⁴

17. Alan Houseman, who was unable to attend all the sessions, has expressed disagreement with some of these recommendations.

18. Memorandum from Alan W. Housman, Executive Director, Center for Law and Social Policy, to Conference Participants 1-3 (Dec. 15, 1998) (on file with the *Fordham Law Review*) [hereinafter Memorandum].

19. *See id.* at 1.

20. *See id.* at 2.

21. *Recommendations, supra* note 2, Recommendation 80, at 1782.

22. *See* Memorandum, *supra* note 18, at 2-3.

23. *Id.* Recommendation 81, at 1782-83.

24. *See* Memorandum, *supra* note 18, at 3.

Notes & Observations